STATUTE INVOLVED.

The Illinois Injuries Act as it existed at the time of the filing of this suit in 1948 is set forth in Appendix A at the end of this Brief. Since then, Section 2 has been amended in matters not here material (Illinois Revised Statutes, 1949, Chapter 70, Section 2. Laws of Illinois 1949, p. 1029). The part of Section 2 here important (unchanged since its enactment in 1935) provides as follows:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

STATEMENT.

Petitioner's decedent was killed in an airplane crash in Utah in 1947 while a passenger aboard respondent's DC-6 airliner. Petitioner, as executor, brought suit in the District Court in Illinois under the Utah Death Statute (Sec. 104-3-11 Utah Code Ann. 1943) against respondent (R. 3, 4; petition p. 2).

As one of its defenses respondent pleaded the above quoted portion of Section 2 of the Illinois Injuries Act and the fact that respondent was qualified to do business in Utah and had registered agents there available for service of process (R. 10). In April, 1950, petitioner moved to strike this defense on the ground that this statute could not limit the jurisdiction of the federal courts (R. 11).

In July, 1950, the Court of Appeals for the Seventh Circuit decided *Trust Company of Chicago* v. *Pennsylvania*

Railroad Co., 183 F. 2d 640, in which the court held that the decisions of this Court in *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, *Woods* v. *Interstate Realty Co.*, 337 U. S. 535, and *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, made it abundantly clear that in diversity cases the above Illinois statute closing the Illinois courts to certain foreign death actions also closed the federal courts in Illinois. Subsequently, in October, 1950, in *Munch* v. *United Air Lines*, a case involving the same accident in which petitioner here met his death, 184 F. 2d 630, the Court of Appeals again upheld the applicability of the Illinois statute under the doctrine of *Erie R. Co.* v. *Tompkins*.

Petitioner then twice amended its motion to strike to raise the constitutional questions here attempted to be presented (the claimed violations of Article III and the full faith and credit clause) (R. 13, R. 19). Each motion to strike was accompanied by an alternative motion to transfer the cause to Utah (R. 12, 15, 21).

The District Court denied both the motion to strike and the motion to transfer and entered judgment for the defendant (R. 22-24).

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ARGUMENT.

Petitioner has not shown the need for by-passing the Court of Appeals. No questions so grave or important that they require immediate action by this Court are presented.

Further, the district court's decision was correct—under the doctrine of *Erie R. Co.* v. *Tompkins* the Illinois Injuries Act prevents petitioner from suing in the federal courts in Illinois where the only ground of federal jurisdiction is diversity of citizenship. Article III of the Federal Constitution is not thereby violated. Nor does the Illinois statute, unequivocally stating the fixed public policy of Illinois, violate the full faith and credit clause.

Finally, a transfer to Utah was correctly refused.

I.

This Court Should Not Grant Certiorari Before Judgment.

As stated above (p. 1) petitioner has shown no pressing need in matters of grave importance for action by this Court before judgment in the Court of Appeals. Jurisdiction, therefore, should be declined (*Forsyth* v. *Hammond,* 166 U. S. 506, 513-515).

II.

Section 2 of the Illinois Injuries Act Does Not Violate Article III of the Federal Constitution.

Article III of the Federal Constitution is not violated:

1. Diversity jurisdiction is not derived from the Constitution, but from the Acts of Congress (*Kline* v. *Burke Construction Co.,* 260 U. S. 226, 233-234).

2. Article III refers to "Controversies * * * between Citizens of different States." This presupposes a *controversy;* if there is *no* controversy (as here) there is no jurisdiction and no violation of Article III (*Cover* v. *Schwartz,* 133 F. 2d 541, 544 (C. A. 2), certiorari denied 319 U. S. 748, rehearing denied 319 U. S. 785). Illinois, therefore, has not attempted to limit federal jurisdiction, but has removed its *source* by denying the existence of the *res* itself (*i. e.,* the existence of the controversy) and there is nothing to which jurisdiction may attach. In essence this was the holding of *Angel* v. *Bullington,* 330 U. S. 183, where this Court applied, in the Federal courts, a state statute prohibiting a deficiency judgment.

3. The Illinois statute does not impair federal jurisdiction. In *Trust Company of Chicago* v. *Pennsylvania Railroad Co.,* 183 F. 2d 640 (C. A. 7), the court said at page 644:

> "Nor do we think this means that the state statute has impaired the federal jurisdiction. Federal diversity jurisdiction, created by the Congressional act, as interpreted by the Supreme Court, is limited in the absence of other grounds for jurisdiction, to cases which the state court might entertain. In other words, implicit in the diversity statute, is the limitation resulting from the Supreme Court's interpretation of diversity jurisdiction. If, as the court says, the federal court, sitting in diversity cases, is only another court enforcing the remedies cognizable by the state court, the limitation upon diversity jurisdiction is inherent in the act creating Federal jurisdiction solely upon the accident of diversity. No new remedies are created by the statute; it merely lodges in another court the authority to enforce remedies cognizable in the state court. The federal court by congressional intent, as the Supreme Court rules, is just the same as that of the state court (provided diversity exists), no more and no less. If, as has been suggested, diversity jurisdiction has been limited, that limitation arises not from action of the state but exists inherently in the federal statute itself as authoritatively interpreted."

The doctrine of *Erie R. Co.* v. *Tompkins* was correctly applied:

The Court of Appeals in *Trust Company of Chicago* v. *Pennsylvania Railroad Co.*, 183 F. 2d 640, and *Munch* v. *United Air Lines*, 184 F. 2d 630, held that under the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, the proviso of Section 2 of the Illinois Act prevented the plaintiffs from suing in the federal courts in Illinois where the only ground of federal jurisdiction was diversity of citizenship. Respondent believes that it correctly so held and that no other decision is consistent with *Guaranty Trust Co.* v. *York*, 326 U. S. 99; *Angel* v. *Bullington*, 330 U. S. 183; *Woods* v. *Interstate Realty Co.*, 337 U. S. 535; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, rehearing denied 338 U. S. 839.

These decisions clearly show that they do not rest on any question of terminology; supposed differences between substance or procedure or between substantive rights or remedial rights or between a defense or a substantive bar (petition, p. 19) are not the controlling factor. The paramount consideration is that in diversity cases litigants should have only such rights as they would have in the state courts in the same state. If the state courts are closed so also are the Federal courts. In *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530, this Court succinctly expressed the essence of the doctrine of *Erie R. Co.* v. *Tompkins* at page 532:

> "*Erie R. Co.* v. *Tompkins*, 304 U. S. 64, was premised on the theory that in diversity cases the rights enjoyed under local law should not vary because enforcement of those rights was sought in the federal court rather than in the state court. If recovery could not be had in the state court, it should be denied

in the federal court. Otherwise, those authorized to invoke the diversity jurisdiction would gain advantages over those confined to state courts."

Under petitioner's argument (petition, p. 7), the doctrine of *Erie R. Co.* v. *Tompkins* (applying only in diversity cases) could never have any effect, because every question, according to petitioner, would be a federal question.

The District Court correctly held that Article III was not violated.

III.

The Illinois Statute Does Not Violate the Full Faith and Credit Clause of the Federal Constitution.

Petitioner here is suing on the statute of Utah. It is well settled that rights given by foreign statute will not be enforced in another state where they offend the statutes or public policy of the forum (*Texas & Pacific R. R. Co.* v. *Cox,* 145 U. S. 593, 605; *Stewart* v. *Baltimore & Ohio R. R. Co.,* 168 U. S. 445, 448; *Indemnity Insurance Co. of North America* v. *Pan American Airways,* 57 F. Supp. 980, 981 (D.C., N.Y.); *Loucks* v. *Standard Oil Co.,* 224 N. Y. 99, 120 N. E. 198, 200, and cases therein cited; *State ex rel. Bossung* v. *District Court,* 140 Minn. 494, 168 N. W. 589, 590; Restatement of the Law, Conflict of Laws, Section 612).

In *Griffin* v. *McCoach,* 313 U. S. 498, this Court said at page 507:

> "* * * Where this Court has required the state of the forum to apply the foreign law under the full faith and credit clause or under the Fourteenth Amendment, it has recognized that a state is not required to enforce a law obnoxious to its public policy. *Bradford Electric Co.* v. *Clapper,* 286 U. S. 145, 160, 161; *Hartford Indemnity Co.* v. *Delta Co.,* 292 U. S. 143, 150."

Further, the sovereign, in its discretion, may refuse to aid the foreign right (Mr. Justice Cardozo, in *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198, at 202).

The public policy of the State of Illinois is clearly and unambiguously expressed:

> "Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place."

That policy is not a prohibition against *all* foreign death actions, but only against those where there is a right of action in the foreign state and the defendant can be there served. In other words, Illinois has refused not only to become an asylum for those seeking to avoid their just obligations, but it has equally refused to become a magnet drawing to itself wrongful death actions from all over the Union. The fact is that the party injured by the wrongful death always has a remedy.

This refusal by Illinois to be an asylum significantly differentiates the Illinois statute from the Wisconsin statute which is attacked in *Hughes* v. *Fetter*, Docket No. 355, as violative of the full faith and credit clause.

When the proviso was initially added in 1903 (Laws of Illinois 1903, p. 217), it prohibited all foreign death actions. In 1935, however, the proviso was amended to its present form set out above (Laws of Illinois 1935, p. 916).

The Supreme Court of Illinois has recognized that the statute states the public policy of Illinois (*Dougherty* v. *American McKenna Co.*, 255 Ill. 369, at 372). In that case, the 1903 statute was held not to violate the full faith and credit clause.

Under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, the federal courts in diversity cases in Illinois are required to honor the stated public policy of Illinois (*Indemnity Insurance Co. of North America* v. *Pan American Airways,* 57 F. Supp. 980, 981 (D. C., N. Y.)).

Further, in interpreting the full faith and credit clause, this Court has repeatedly insisted that it would weigh all the interests of each state involved before holding that the full faith and credit clause qualified one state's power to govern its own affairs. In *Alaska Packers Assn.* v. *Industrial Accident Comm.,* 294 U. S. 532, this Court refused to give effect to an Alaska statute in a proceeding in California. The Court said at page 547:

> "* * * the conflict is to be resolved, not by giving automatic effect to the full faith and credit clause, compelling the courts of each state to subordinate its own statutes to those of the other, but by appraising the governmental interests of each jurisdiction, and turning the scale of decision according to their weight."

The public policy of Illinois in this case, as expressed in its statute, clearly outweighs the interest of Utah and the other states of the Union for the following reasons:

Those to whom a foreign statute gives a right of action can obtain redress in the state where the cause accrued if service of process can be had upon the defendant. But in the event that a person liable is not subject to service in that state, but can be found in Illinois, then suit can be commenced there. Thus Illinois has refused to become a refuge for those attempting to escape their just obligations.

The legislature of Illinois also undoubtedly had in mind the difficulties and hardships involved in compelling witnesses, who in all probability would reside in the state

where the accident occurred, to come to Illinois to testify. Other important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Too, Illinois is vitally interested in preventing the administrative difficulties which arise in its courts when litigation is piled up in congested centers, instead of being handled at the place of origin, and in providing relief from the unjust tax burdens and the burden of jury duty imposed upon its residents when foreign cases are imported into its courts. Further, Illinois is naturally interested in preserving to its citizens reasonable access to its already overcrowded courts.

Considerations such as these were considered important and controlling by this Court in upholding the right of states to deny to non-residents access to their "often overcrowded courts" in actions under the Federal Employers' Liability Act (*Missouri ex rel. Southern Railway* v. *Mayfield,* 340 U. S. 1, 4; *Douglas* v. *New York, New Haven & Hartford R. R. Co.,* 279 U. S. 377).

Broderick v. *Rosner,* 294 U. S. 629 (brief, p. 26) is distinguishable from the case at bar. The statute there involved was not a death statute. The statutory liability sought to be enforced was contractual in character. The right here relied on is a statutory tort liability and did not exist at common law. No one has a vested right in a death action and a legislature can entirely abolish the right (*Wall* v. *Chesapeake & Ohio Ry. Co.,* 290 Ill. 227, at 232). In addition, the New Jersey statute in that case amounted to a complete prohibition. Not so here.

The cases cited (brief, p. 27) are likewise not in point. None is a tort case. All are concerned with contract rights.

The Illinois statute does not violate the full faith and credit clause.

IV.

Section 1406(a) of the Judicial Code Does Not Empower the District Court to Transfer This Cause.

The District Court likewise correctly denied petitioner's alternative motion to transfer this cause to the District Court of Utah under Section 1406(a) of the Judicial Code (Title 28, United States Code, Section 1406(a)) (R. 23). That section provides:

> "(a) The district court of a district in which is filed a case *laying venue in the wrong division or district* shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (Emphasis supplied.)

It will be noted that this section applies only when there is wrong venue. Here the venue was correct under Section 1391(a) of the Judicial Code (Title 28, United States Code, Section 1391(c)). Respondent was doing business in Illinois. Venue being proper, Section 1406(a) therefore has no application.

Trust Company of Chicago v. *Pennsylvania Railroad Company,* 183 F. 2d 640, 646, holds Section 1406(a) inapplicable. There, as here, suit had not been brought in the wrong venue.

In addition, Section 1406(a) has no application unless the Court has jurisdiction.

In *Orr* v. *United States,* 174 F. 2d 577 (C. A. 2), relied on by petitioner, the Court said at page 580:

> "The Reviser's Note to Section 1406(a) says that that section 'provides statutory sanction for transfer

> instead of dismissal, where venue is improperly laid.' This comment on the scope of Section 1406(a) seems to point directly to the elimination of the bar of the statute of limitations in cases *where jurisdiction exists* and there is nothing to prevent its exercise but the lack of proper venue." (Emphasis supplied.)

There is a vast difference between jurisdiction and venue (*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 167-168; Moore's Commentary on the U. S. Judicial Code, pages 172-173). Lack of jurisdiction of subject matter is fatal and can be raised at any time (*Green* v. *Obergfell*, 121 F. 2d 46, 54-55 (C. A., D. C.), certiorari denied 314 U. S. 637).

Herb v. *Pitcairn*, 325 U. S. 77, is no authority for a transfer in this case. In that case this Court merely held that the statute of limitations of the Federal Employers' Liability Act had been satisfied; it decided nothing as to a transfer even under the Illinois practice. More important, no question was raised, and consequently none was decided, as to federal transfer procedure. As shown above, no transfer can be made under Section 1406(a) unless the court initially has jurisdiction. There is no such jurisdiction here.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A.

Illinois Revised Statutes (1947), Chapter 70:

Wrongful Death.

An Act requiring compensation for causing death by wrongful act, neglect or default. (Approved February 12, 1853. L. 1853, p. 97.)

1. Killing—Action survives) Sec. 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who or company or corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

2. Action—By whom Brought—Limit of Damages—Death outside State.) Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death,

to the wife and next of kin of such deceased person, not exceeding the sum of $15,000: Provided, that every such action shall be commenced within one year after the death of such person. Provided, further, that no action shall be brought or prosecuted in this State to recover damages for a death occurring outside of this State where a right of action for such death exists under the laws of the place where such death occurred and service of process in such suit may be had upon the defendant in such place.

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